

ESTTA Tracking number: **ESTTA701980**

Filing date: **10/13/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91224043
Party	Defendant BYODYNE, LLC
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Submission	Opposition/Response to Motion
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Date	10/13/2015
Attachments	TTAB V2.pdf(623364 bytes)

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
3

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6 Cory Stenzel
7 dba: Byodyne, LLC
8 Applicant,
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10 v.

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12 Demeter Association, Inc.
13 Opposer,
14 _____
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17 In the matter of
18 Trademark Registration No. 86550931
19 Mark: BYODYNE

20 **RESPONSE TO NOTICE OF
21 OPPOSITION**

22 Opposition No. 91224043
23

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25 **APPLICANTS ANSWER TO NOTICE OF OPPOSITION**
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27 Cory Stenzel, (hereinafter "Applicant") provides the following answer to the Notice of
28 Opposition filed by Mr Paul W. Reidl, counsel for Demeter Association, Inc. (hereinafter
29 "Opposer") against application for registration of Applicant's trademark BYODYNE, Serial No.
30 86550931 filed March 2nd, 2015, and published for opposition on August 2nd, 2015, pleads and
31 avers as follows:
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33 I.
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35 Applicant's company's principal place of business is based out of Clackamas County, Oregon and
registered as BYODYNE, LLC with the Corporate Division of Oregon Secretary of State
(Registry #1122029-99). Applicant's company's provides goods and services for dietary and
nutritional supplements; Dietary and nutritional supplements for endurance sports; Dietary and
nutritional supplements used for weight loss; Dietary food supplements; Dietary supplement
drink mixes; Dietary supplements; Dietary supplements for human consumption; Dietary
supplements in the nature of weight loss powders; Herbal supplements; Nutritional supplement
in the nature of a nutrient-dense, protein-based drink mix; Nutritional supplements; Nutritional
supplements in the form of powders, capsules, liquids, syrups; Powdered nutritional supplement

concentrate; Powdered nutritional supplement drink mix; Protein dietary supplements; Protein supplement shakes; Protein supplements; Vitamin supplements; Weight management supplements; Whey protein supplements.

Applicant established the website domain, www.byodyne.com, on March 3rd, 2015 with the intent of establishing a site for e-commerce. Applicant registered the mark with the Corporate Division of Oregon Secretary of State on June 17th, 2015 (Registry #1122029-99). Applicant began initiating accounts and ordering raw ingredients in preparation of production using the mark on June 24th, 2015. Applicant initiated a financial account (dba as BYODYNE) on June 29th, 2015. Applicant intended to file the USPTO Allegation of Use once the mark was classified as 'unopposed.'

Applicant manufactures dietary supplements designed to improve athletic performance. Applicant sources raw materials from domestic and foreign suppliers. Applicant's products conform to Current Good Manufacturing Practices (CGMPs) for proper design, monitoring, and control of manufacturing processes and facilities as required by the Food and Drug Administration (FDA)¹. CGMPs are intended to improve dietary supplement safety by establishing regulations in which ensures adherence to certain quality standards. Furthermore, Applicant's company's products are manufactured in a facility that adheres to the National Sanitary Foundation International (NSF) standard. NSF certification involves additional regulations for testing and auditing of the manufacturing of dietary supplements. NSF is a third-party regulator and isn't a requirement for dietary supplement manufacturing and/or distribution².

After conducting a search of the USPTO's Trademark Electronic Search System (TESS) as well as a diligent state-to-state business directory search for the term BYODYNE and its synonyms, Applicant filed with the USPTO on March 2nd, 2015. Applicant believed the name was sufficiently dissimilar from any other entity or entities within the same class that there would be no risk of a consumer mistaking Applicant's mark with that of another's.

The Applicant's company's direction is defined in the "About Us" section of the Applicant's website (<http://www.byodyne.com/pages/about-us>). The following is a copy of that statement:

"Founded in 2014, our company headquarters are located in the beautiful Pacific Northwest. Byodyne was the result of increasing frustration with the state of the supplement market. As we are supplement consumers ourselves, we began researching each ingredient manufacturers were putting in their bottles. To our surprise, we discovered there was either no research supporting the effectiveness of a particular ingredient or more commonly, the amount of the ingredient was way too low to produce the benefits shown by the studies. Furthermore, nearly every manufacturer was using artificial sweeteners and dyes!

We became so motivated to produce products that contained effective ingredients at the doses necessary to produce results, we decided to mortgage our homes to start a brand-new company.

Byodyne was born. The name "Byodyne" is a derivative of the Latin and Greek terms; bio meaning "life" and dyne meaning "force."

We spent 3 years of research and development designing our first product release. This signature line was formulated based on compiling hundreds of scientific research articles and beta-testing sample batch after sample batch. We are extremely proud of what we've accomplished and the products we're offering to you! By the time we settled on our final formulations, we had received unanimous praise and excitement from all of our product testers.

All of our products are produced in compliance with the Food and Drug Administration's (FDA) Current Good Manufacturing Processes (CGMPs) and manufactured in facilities that meet or exceed the National Sanitation Foundation International (NSF) standards. NSF is accredited by the Occupational Safety and Health Administration (OSHA), the Standards Council of Canada (SCC), the American National Standards Institute (ANSI), and the International Accreditation Service (IAS). Even the scoops we use are manufactured in a facility that has received Food Safety Management System Certification (FSSC 22000)."

II.

The likelihood of confusion between marks is the manner in which the "relevant public" erroneously believes the goods or services belonging to two separate marks originate from the same entity³. A mark registered prior to the establishment of the disputed mark is often referred

to as the "senior" mark and the latter, as the "junior" mark. The test to determine the risk for likelihood of confusion is multifaceted. All circumstances in which the marks are to be used need to be carefully weighed for relevancy prior to a determination being made. Additionally, the senior mark generally is granted an additional level of consideration for its established distinction and/or reputation with respect to its goods and services. The assessment of risk is generally viewed globally with respect to all factors relevant to the circumstances of the case. More specifically, a likelihood for confusion exists when the conditions of the junior mark is identical or with a high degree of similarity with the goods and services of the senior mark. These conditions are seen as cumulative and if not satisfied, a likelihood of confusion cannot occur (CTMR, Article 8(1)(b)).

During a determination of risk, the definition of "relevant public" must be established. While the average consumer is reasonably informed they generally view the trademark as a whole and less its parts⁴. Therefore the context of relevant public for this case rests in the category of goods and services provided by the senior and junior mark holders. Additionally, a the degree of specialization of the product (i.e. surgical instruments) must be considered compared to mass produced ones (i.e. socks) when assessing relevant public.

According to the Demeter-USA's website, the Opposers mark, "BIODYNAMIC" has an ascribed meaning statement: *"The first Farm Standard was written in Germany in 1928 following Rudolf Steiner's Agriculture Course. Its purpose was to codify what Steiner had presented in his lectures and ensure its adherence through a strict certification program. The Farm Standard is historically significant because it dates back to the beginning of the modern sustainable farming movement, and captures key agronomic principles not comprehensively addressed within any other agriculture certification system. Here in the United States, it provides the legal definition of "Biodynamic" through the certification mark."* (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>).

Demeter-USA's website further states, *"Sections of the Farm Standard include necessary elements of the farm organism, soil fertility management, crop protection, greenhouse management, animal welfare, and the use of the preparations. Biological diversity within the*

129 *farm landscape is emphasized, and requires that a minimum of ten percent of the total farm*
130 *acreage be set-aside as a biodiversity preserve. That may include but is not limited to forests,*
131 *wetlands, riparian corridors, and intentionally planted insectaries. Diversity in crop rotation*
132 *and perennial planting is required: no annual crop can be planted in the same field for more*
133 *than two years in succession. Bare tillage year round is prohibited so land needs to maintain*
134 *adequate green cover."* (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>)

136 When assessing the likelihood of confusion for the relevant public, the test looks at the whole as
137 well as individual parts. Here, the Opposer protects its trademark by defining a farm as:
138 *"necessary elements of the farm organism, soil fertility management, crop protection,*
139 *greenhouse management, animal welfare."* As well as setting aside a minimum of 10% of farm
140 acreage to be dedicated as a biodiversity reserve. The Applicant however, does not intend,
141 purport, or ever reference, promote, cite, or infer to farming, biodiversity, soil fertility
142 management, crops, or animal welfare, nor does the Applicant at any time reference any
143 standard, practice, or certification involving organic farming principals during the course of
144 business manufacturing and distributing dietary supplements for athletes. It would be reasonable
145 based on this to believe the relevant public would not be at risk for a likelihood of confusing the
146 goods and services of the Applicant's and Opposer's respective companies.

148 Demeter-USA's website further states, *"The Farm Standard instructs that the foundation of the*
149 *fertility system, and strategies for disease, insect, and weed control, must originate from the farm*
150 *itself. Fertility is generated via the integration of livestock, compost and green manure, nutrient*
151 *catch crops, and careful crop rotation. Disease and insect control are addressed through*
152 *botanical species diversity, predator habitat, balanced crop nutrition, and attention to light*
153 *penetration and airflow. Weed control emphasizes prevention, including timing of planting,*
154 *mulching, and identifying and avoiding the spread of invasive weed species."*
155 (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>)

157 Here, the Opposer protects its trademark by promoting the Farm Standard by means of a,
158 *"...fertility system, and strategies for disease, insect, and weed control..."*. The Applicant
159 however, does not intend, purport, or ever reference a fertility system or strategies for disease,

insect, or weed control, nor does the Applicant ever at any time reference, promote, cite, or infer to species diversity, predator habitat, balanced crop nutrition, and attention to light penetration and airflow during the course of business manufacturing and distributing dietary supplements for athletes. It would be reasonable based on this to believe the relevant public would not be at risk for a likelihood of confusing the goods and services of the Applicant's and Opposer's respective companies.

Demeter-USA's website further states, "*The use of the preparations is a requirement of the Farm Standard. There are nine in all, made from herbs, mineral substances and animal manures, that are utilized in field sprays and compost inoculants applied in minute doses, much like homeopathic remedies are for humans. Timely applications revitalize the soil and stimulate root growth, enhance the development of microorganisms and humus formation, and aid in photosynthetic activity.*" (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>).

Here, the Opposer protects its trademark by establishing the application of nine preparations as required by the "Farm Standard" that include, herbs, mineral substances and animal manures. The Applicant however, does not intend, purport, or ever reference, promote, cite, or infer to the process of stimulating root growth through the use of herbs, mineral substances, and animal manures, nor does the Applicant ever at any time reference the development of microorganisms, humus formation, or photosynthetic activity during the course of business manufacturing and distributing dietary supplements for athletes. It would be reasonable based on this to believe the relevant public would not be at risk for a likelihood of confusing the goods and services of the Applicant's and Opposer's respective companies.

Finally, Demeter-USA's website further states, "*The crops resulting from a certified Biodynamic farm are themselves certified (for example Biodynamic tomatoes), but in order to produce a certified processed product (for example pasta sauce) the product must be produced in accordance with the Demeter Biodynamic® Processing Standard. There are fourteen different processing standard categories (compared to one for the entire National Organic Program), including wine, cheese, olive oil, dairy and body care. The Processing Standard is very*

important because it guarantees an unbroken chain of accountability from the farm to the finished product, and delivers a product that allows for the integrity and purity of the agricultural ingredients to define it." (<http://www.demeter-usa.org/learn-more/biodynamic-farm-standard.asp>)

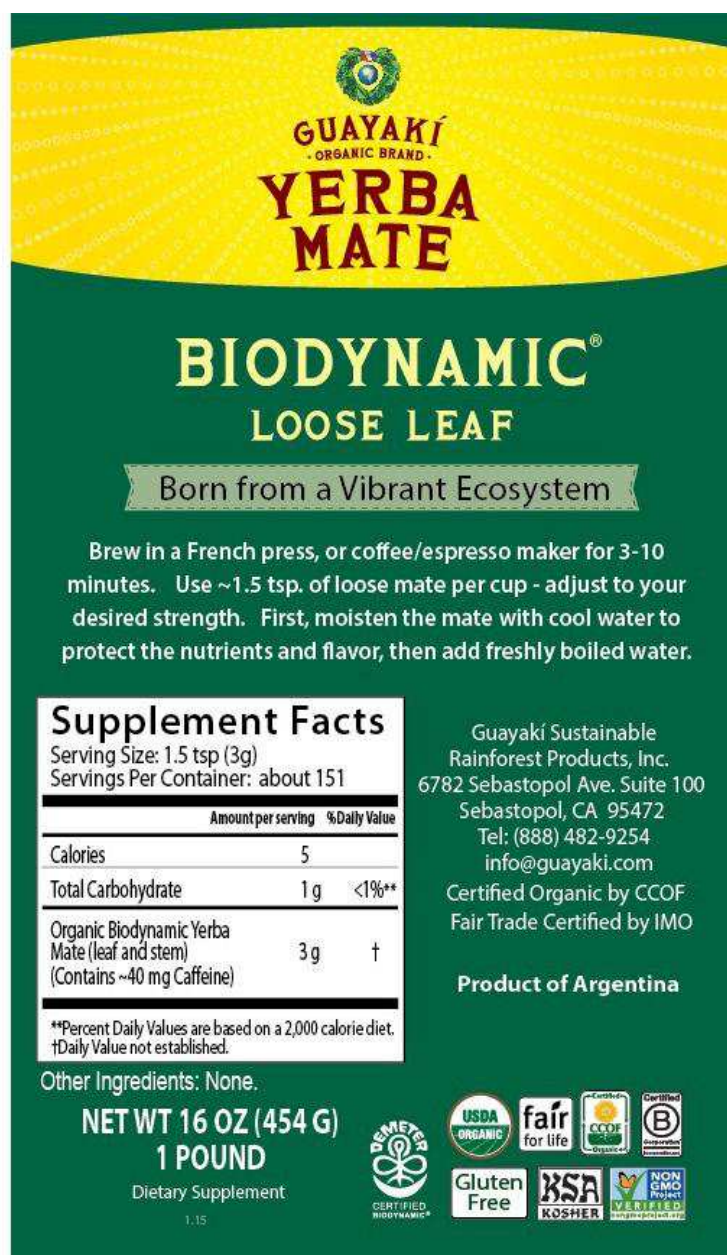
Here, the Opposer asserts its protected trademark by defining the Biodynamic farming certification. The Applicant however, does not intend, purport, or ever reference the Demeter Biodynamic Processing Standard, nor does the Applicant ever at any time reference or display this certification as illustrated:



<http://www.demeter-usa.org/media/>

Further, this certification, when used on finished product labels appears as such:





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225 The mark illustrated in the above two samples as used in commerce, displays the name
 226 DEMETER most prominently followed by an artistic design atop the word CERTIFIED with the
 227 mark BIODYNAMIC being the least emphasized element of the label. When used upon a label
 228 in commerce, the Demeter Association, Inc. mark "Biodynamic" is affixed on the back of the
 229 label and intermingled among other certification marks. On the final label, the word
 230 BIODYNAMIC is in association with the words "loose leaf" and "Born from a vibrant

Answering page 1, paragraph 1 of the Notice of Opposition, Applicant does not contest the allegations thereof.

Answering page 1, paragraph 2 of the Notice of Opposition, Applicant does not contest the allegations thereof.

Answering page 2, paragraph 3 of the Notice of Opposition, , Opposer states Opposer is the owner of US Certification Mark Registration No. 2,286,984 for the mark BIODYNAMIC for "agricultural food and fiber products and processed food products" grown and processed in accordance with strict natural processes and organic guidelines. The Applicant however, does not intend, purport, or ever reference, promote, cite, or infer to agricultural food and fiber products and processed food products" grown and processed in accordance with strict natural processes and organic guidelines during the course of business manufacturing and distributing dietary supplements for athletes. It would be reasonable based on this to believe the relevant public would not be at risk for a likelihood of confusing the goods and services of the Applicant's and Opposer's respective companies.

Answering page 2, paragraph 4 of the Notice of Opposition, Opposer states Opposer is owner of US Certification Mark Registration No. 3,102, 570 for the mark BIODYNAMIC for "products meeting organic and as well as certain ecological, farm diversity and other standards and guidelines, namely (Opposer subsequently lists approximately 305 goods their mark encompasses to include: soil additives, nutritional supplements, crib blankets, kimonos, stuffed toy animals, edam, eggs, live animals, flower seeds, drinks, and alcoholic beverages). Opposer further states, "These must all be grown, made and processed in accordance with Opposer's organic standards and ecological, farm diversity and other standards and guidelines. The Applicant's mark BYODYNE however, lists 18 goods for which its mark encompasses, namely: dietary and nutritional supplements, dietary and nutritional supplements for weight loss/endurance sports, nutritional supplements, protein supplements, vitamin supplements, and weight management supplements. The Applicant however, does not intend, purport, or ever reference, promote, cite, or infer to "products meeting organic and as well as certain ecological, farm diversity and other standards and guidelines" during the course of business manufacturing

and distributing dietary supplements for athletes. Further, while the BIODYNAMIC and BYODYNE marks share the same goods reference relating to dietary supplements specifically, the Opposer assigns a process to which each of their approximately 305 goods their mark encompasses that they must be "grown, made and processed in accordance with Opposer's organic standards and ecological, farm diversity and other standards and guidelines." The Applicant however, does not intend, purport, or ever reference, promote, cite, or infer to farming practices during the course of business manufacturing and distributing dietary supplements for athletes. It would be reasonable based on this to believe the relevant public would not be at risk for a likelihood of confusing the goods and services of the Applicant's and Opposer's respective companies.

Answering page 4, paragraph 5 of the Notice of Opposition, Opposer states, "Opposer owns extremely valuable goodwill which is symbolized by its BIODYNAMIIC Mark and each use of this mark substantially increases such goodwill and promotes Opposer's mission of improving the health of the planet through the use of organic and sustainable farming practices." The Applicant however, does not intend, purport, or ever reference, promote, cite, or infer to organic and sustainable farming practices during the course of business manufacturing and distributing dietary supplements for athletes. It would be reasonable based on this to believe the relevant public would not be at risk for a likelihood of confusing the goods and services of the Applicant's and Opposer's respective companies.

Answering page 4, paragraph 6 of the Notice of Opposition, Applicant does not contest the allegations thereof.

Answering page 4, paragraph 7 of the Notice of Opposition, the Opposer states the "Opposer's goods and Applicant's services would be purchased/used by the same purchasers in the same channels of trade and would be marketed and promoted in the same channels. Accordingly, consumers would inevitably be led mistakenly to believe that Applicant's goods are certified, sponsored by, or affiliated with Opposer." The Applicant's mark BYODYNE intended purpose is the name of the company manufacturing dietary supplement products for athletes. These products are intended to be marketed in a retail setting on the Applicant's website with an

expectation the Applicant's products will be marketed in retail store locations for end consumers. The Opposer's mark however, is a farming practice which allows use of the Demeter Biodynamic Certified mark mentioned above by the manufacturer of a product to include upon their label to be marketed to end consumers. On October 13th, 2015, the Applicant conducted a Google web search using the terms "Biodynamic" and "dietary supplements." The Applicant observed zero hits with any dietary supplement product associated with biodynamic returning in the search result list. On October 13th, 2015, the Applicant conducted a Google shopping search using the terms "Biodynamic" and "dietary supplements." The Applicant observed zero hits with any dietary supplement product associated with biodynamic returning in the search result list. On October 13th, 2015, the Applicant conducted a search of Bodybuilding.com's store website using the term "Biodynamic." The Applicant knows that the site, bodybuilding.com is one of the largest e-tailer's of dietary supplements on the market today ranking 369 of webpage views in the US (<http://www.alex.com/siteinfo/bodybuilding.com>) and with a worth of approximately \$448 million (<http://www.worthofweb.com/website-value/bodybuilding.com/>). The Applicant observed zero hits for any dietary supplement product associated with the term biodynamic returning in the search result list. On October 13th, 2015, the Applicant conducted a website search on several other large and well-known dietary supplement retailers to include: GNC.com, VitaminWord.com, VitaminShoppe.com, MaxMuslce.com, SupplementWarehouse.com, ProSource.net, and NutritionExpress.com using the term "Biodynamic". The Applicant observed zero hits for any dietary supplement product associated with the term biodynamic returning in the search result list. On October 13th, 2015, the Applicant conducted a website search on Amazon.com store using the term "biodynamic." Among the products in the search result list, the Applicant observed only those relating to books on agriculture, horticulture, gardening, and nature conservation. The Applicant then refined the search on Amazon.com to limit those only relating to "Vitamins & Dietary Supplements." The Applicant observed products relating to specific herbal supplements (i.e. artichoke, nettle, echinacea, and bilberry) but none were observed as being marketed for improving athletic performance, nor did they bare the term "biodynamic" in any prominent fashion. Based on the above, it is not reasonable to believe that Demeter Inc and Byodyne, LLC share the same customer base and thus, it is not reasonable to believe that a likelihood of confusion would exist that would lead the relevant public to mistakenly believe that products manufactured by Byodyne are affiliated with Demeter Inc.

354 Answering page 5, paragraph 8 of the Notice of Opposition, the Opposer states, "The registration
355 of Applicant's mark would be inconsistent with Opposer's rights in its BIODYNAMIC Mark, and
356 would cause damage and injury to Opposer." With respect to the information provided by the
357 Applicant above, the Opposer has failed to provide sufficient evidence of potential injury. The
358 Applicant asserts that the likelihood of confusion does not exist between the two marks and
359 thusly, it is not reasonable to believe the Opposer risks injury with registration of the Applicant's
360 mark.

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362 Answering page 5, paragraph 9 of the Notice of Opposition, the Applicant has evidenced the
363 Applicant's intention to file requisite forms with the USPTO as well as significant anticipatory
364 steps, as outlined above, for preparation of product launch. The Applicant believes it has
365 evidenced it's bona fide intention to use the applied-for mark and Opposer's argument on this
366 point should be rendered null.

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368 IV.
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370 The Applicant affirmatively alleges that there is no likelihood of confusion because Opposer's
371 and Applicant's marks are not sufficiently similar. Upon information and belief, ordinary
372 prospective purchasers of Applicant's products would not associate Applicant's and Opposer's
373 marks.

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375 For the above reasons, the Opposer's Motion for Opposition should be denied.
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377 Respectfully Submitted,

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A handwritten signature in black ink, appearing to read 'Cory Stenzel', is written over the signature line. The signature is fluid and cursive, with the first letter 'C' being large and prominent.

382 Cory Stenzel

383 BYODYNE, LLC

384 2113 SE Williams Drive

385 Gresham, OR 97080
386 Voice: 503-319-5688
387 Email: support@byodyne.com

388

389

390

391

REFERENCES

392 1. *<http://www.fda.gov/Drugs/DevelopmentApprovalProcess/Manufacturing/ucm169105.htm>*

393 2. *<http://www.nsf.org/about-nsf/>*

394 3. *Becker v. Harman Int'l indus. (2010)*

395 4. *Aceites del Sur-Coosur v. Koipe (2009)*

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399 **CERTIFICATE OF SERVICE**
400

401 I HEREBY CERTIFY that this correspondence was electronically filed with the Trademark Trial
402 and Appeal Board on October 13th, 2015.
403

404 I HEREBY CERTIFY that a true and complete copy of the foregoing Applicant's Response to
405 Notice of Opposition has been served on the attorney for the Opposer, Mr. Paul W. Reidl (CA
406 Bar No. 155221), at 241 Eagle Trace Drive, Half Moon Bay, CA 94019 by electronic email to
407 paul@reidllaw.com.
408

409 
410
411

412 Signed: _____

413 Date: 10/13/15
414

415 By: Cory Stenzel, Founder
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420